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June 9, 2000

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, DC 20554

99-292

Re: Establishment of a Class A Television Service
MM Docket No. 00-10

Dear Ms. Salas:

Transmitted herewith on behalf of The WB Television Network are an original and four copies of its Petition for Reconsideration filed in response to the FCC's *Report and Order*, FCC 00-115 (released April 4, 2000), in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.

Andrew S. Kersting
Counsel for The WB Television Network

Enclosure
cc (w/ encl.): Certificate of Service (by hand)

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A	)	MM Docket No. 99-292
Television Service	)	RM-9260

To: The Commission

PETITION FOR RECONSIDERATION

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June 9, 2000

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SUMMARY

In the *Report and Order*, the FCC erred by requiring Class A applications to protect only a limited class of pending NTSC applications, rather than all pending applications for new full-service television stations. The Commission's interpretation of Section 336(f)(7)(A) of the Community Broadcasters Protection Act ("CBPA") is inconsistent with the rules of statutory construction. Indeed, if Congress had intended to upset the Commission's well-established regulatory scheme by giving Class A applications priority over previously-filed applications for new full-service televison stations, including stations which would provide their respective communities with a first local television service, Congress would have done so through clear and unambiguous language.

The Commission also erred by extending the Class A application filing window to a period of up to six months from the effective date of the new rules. Section 336(f)(1)(C) of the CBPA expressly states that all qualified LPTV licensees "may submit an application for a class A designation . . . *within 30 days after final regulations are adopted* . . . ." 47 U.S.C. §336(f)(1)(C) (emphasis added). In interpreting this provision, the FCC again violated the principles of statutory construction because it ignored the plain meaning of the statutory language and its interpretation rendered a key part of the provision superfluous. By extending the 30-day statutory filing period, the Commission impermissibly substituted its judgment for that of Congress and effectively eviscerated Congress' carefully-designed statutory timetable.

Assuming, *arguendo*, that the FCC does not reconsider its decision and require Class A applications to protect all pending NTSC applications, the Commission should adopt a procedure for resolving conflicts between pending NTSC proposals and conflicting Class A stations that is similar to the procedure used in FM allotment cases. Moreover, due to the brief statutory period in

which Class A applications may be filed and the expedited time frame in which the Commission must grant acceptable Class A applications, the Commission should make the grant of any Class A application conditioned upon its reconsideration order in this proceeding and the D.C. Circuit's decision in *Orion Communications Limited v. FCC*, Case Nos. 98-1434, *et al.* (pending appeal of the FCC's auction rulemaking proceeding).

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A	)	MM Docket No. 99-292
Television Service	)	RM-9260

To: The Commission

PETITION FOR RECONSIDERATION

The WB Television Network ("The WB"), by its attorneys, hereby requests reconsideration of the *Report and Order*, FCC 00-115 (released April 4, 2000) ("*R&O*"), in the above-captioned proceeding. In support of this petition, the following is stated:[1]

I. Introduction.

The WB respectfully submits that the Commission erred in the *R&O* by requiring Class A applications to protect only a limited class of pending NTSC applications. The Commission also erred by extending the 30-day statutory filing period expressly set forth in the Community Broadcasters Protection Act ("CBPA") and permitting Class A applications to be filed for a period of up to six months after the effective date of the new rules.

Nevertheless, in the event the Commission refuses to reconsider its determination regarding the protection that Class A applications must afford pending NTSC applicants, the Commission should adopt a procedure to resolve conflicts between Class A stations and pending NTSC proposals

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[1] A summary of the *R&O* was published in the Federal Register on May 10. 2000. *See* 65 Fed.Reg. 29985 (May 10, 2000). Therefore, this petition is timely filed pursuant to Section 1.429 of the Commission's rules. 47 C.F.R. §1.429.

that is similar to the channel relocation procedure used in FM allotment cases. Moreover, the grant of any Class A application should be conditioned upon the Commission's reconsideration order in this proceeding and the D.C. Circuit's decision in a pending appeal from the FCC's orders in its auction rulemaking proceeding.[2] Finally, the Commission should clarify its "local programming" requirement for Class A stations.

II. The FCC Erred By Not Requiring Class A Applications to Protect All Pending NTSC Applications.

In the *R&O*, the Commission required Class A applications to protect only authorized full-service television stations and a limited class of pending NTSC applications. Specifically, the Commission concluded that it would require Class A applicants to protect the facilities that were proposed in any NTSC applications that were pending as of November 29, 1999, that had completed "all processing short of grant as of that date, and for which the identity of the successful applicant is known." *R&O* at ¶44. The Commission stated that this class of pending NTSC applications included post-auction applications, applications which have been proposed for grant in pending settlements, and "any singleton applications that are cut off from further filings." *Id.*

The Commission's determination regarding those NTSC applications entitled to protection is based in large part upon the language in Section 336(f)(7)(A) of the CBPA concerning a full-service television station's "predicted Grade B contour."[3] The Commission concluded that it could

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[2] *See First Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97234, *et al.*, 13 FCC Rcd 15920 (1998); *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999).

[3] Section 336(f)(7)(A) of the CBPA provides that the FCC may not grant a Class A license (nor approve a modification of a Class A license) unless the applicant demonstrates, *inter*

(continued...)

protect only those pending NTSC applications which had "completed all processing short of grant" because, in its view, only those applications have a "reasonably ascertainable Grade B contour."[4] *R&O* at ¶44. The Commission also stated that it would not require Class A applicants to protect pending rulemaking petitions for new or modified NTSC channel allotments, or full-service applications that were not accepted for filing by November 29, 1999, including most freeze waiver applications. *Id.*

The FCC's decision to protect only a limited class of pending NTSC applications is inconsistent with the principles of statutory construction. The *R&O* makes clear that the Commission found Section 336(f)(7)(A) of the CBPA, and, specifically, the phrase, "transmitting in analog format," to be ambiguous.[5] Under the Commission's longstanding regulatory scheme, LPTV stations have always received protection secondary to that afforded to full-service television

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[3](...continued)
alia, that the proposed Class A station will not cause interference within the "predicted Grade B contour . . . of any station transmitting in analog format . . . ." 47 U.S.C. §336(f)(7)(A).

[4] The Commission's reliance upon Congress' reference to "predicted Grade B contour" is misplaced because that language refers merely to the extent of protection that pending NTSC applicants are entitled to, rather than the identity of those applicants entitled to such protection.

[5] The Commission stated:

> It is not immediately clear from the statutory language whether the station entitled to interference protection must have been "transmitting in analog format" as of the date of enactment of the CBPA in 1999, or as of the date it would experience the interference. We believe that a sound interpretation of the statutory language . . . is that it refers to the nature of the service entitled to protection (*i.e.*, analog) rather than to its operational status on the date of enactment of the CBPA.

R&O at ¶45.

stations.[6] Thus, in accordance with the rules of statutory construction, if Congress intended to upset the Commission's well-established regulatory scheme by giving LPTV stations priority over full-power television stations, it was required to do so through clear and unmistakable language.[7] In light of the ambiguous language contained in Section 336(f)(7)(A), and Congress' failure to express a clear legislative intent to afford Class A LPTV applications protection from pending applications for new full-power stations, there is no statutory basis for overturning the Commission's longstanding regulatory framework and requiring any of the pending NTSC applications to protect subsequently-filed Class A applications.

The Commission's decision to protect only a limited group of pending NTSC applications also is inconsistent with the protection that Congress afforded to pending applications for LPTV and TV translators, which are not entitled to primary service status.[8] As noted above, LPTV and TV

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[6] *See, e.g., Low Power Television and Television Translator Service*, MM Docket No. 86-286, 1986 FCC LEXIS 3075, ¶18 (1986) (Notice of Proposed Rulemaking) ("Television translators have always been considered secondary to full service television stations in spectrum priority. This secondary status was continued when the low power television service was instituted.").

[7] *See U.S. v. Singleton*, 165 F.2d 1297, 1302 (10th Cir. 1999) ("in light of the longstanding practice . . . we must presume [that] if Congress had intended . . . [to] overturn this ingrained aspect of American legal culture, it would have done so in *clear, unmistakable and unarguable language*") (emphasis added), *cert. denied*, 119 S. Ct. 2371 (1999); *Estate of Wood v. IRS*, 909 F.2d 1155, 1160 (8th Cir. 1990) (Congress is presumed to act with knowledge of existing law, and, "absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction"), quoting *Johnson v. First National Bank of Montevideo*, 719 F.2d 270, 277 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984).

[8] Section 336(f)(7)(B) of the CBPA requires Class A applications to protect authorized LPTV and TV translator stations, as well as pending applications for such facilities. Unlike full-service stations, which have always enjoyed primary service status (and a priority over secondary services such as LPTV and TV translator stations), it was necessary for Congress to use specific

(continued...)

translator stations have always been secondary services subject to displacement by full-service stations at any time. It is well established that "full-service stations, by definition, can reach larger audiences than the low power television stations."[9] In enacting the CBPA, Congress acknowledged that LPTV stations do not offer public interest benefits commensurate with those provided by full-power stations. Indeed, Congress recognized that LPTV stations are not a satisfactory substitute for full-power stations, and cannot cover the same wide areas.[10]

In light of the explicit Congressional directive to protect pending applications for LPTV and TV translator stations, which have always been secondary services, the Commission's decision not to protect all pending applications for full-power television stations is all the more puzzling. After finding the language in Section 336(f)(7)(A) to be ambiguous, and that Congress did not express a

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[8](...continued)
statutory language to extend such protection to these facilities because, in the absence of such express language in the statute, they would not be entitled to protection from Class A, primary service applications.

[9] *Memorandum Opinion and Order of the Third Report and Order*, MM Docket No. 87-268, 7 FCC Rcd 6924, 6953 (1992), citing *Memorandum Opinion and Order of the Second Report and Order*, 7 FCC Rcd 3340, 3350-52 (1992).

[10] *See* 145 Cong. Rec. S14724 (November 17, 1999), which states:

> . . . LPTV stations . . . serve a much smaller geographic region than do full-service stations. LPTV signals typically extend to a range of approximately 12 to 15 miles, whereas the originating signal of full-service stations often reach households 60 or 80 miles away.
>
> * * * * *
>
> Low-power television plays a valuable, *albeit modest, role* in [the video programming] market . . . .

Id. (emphasis added).

clear legislative intent to overturn the Commission's longstanding regulatory scheme of protecting NTSC applications from subsequently-filed primary service applications, the Commission should have questioned why Congress would protect pending applications for secondary services -- which are not even eligible for Class A status -- and, at the same time, not expressly protect pending applications for full-service stations, which provide substantially greater public interest benefits. The answer is clear: Congress never intended to upset the FCC's longstanding regulatory framework, but, instead, merely intended for the Commission to incorporate Class A licenses into its existing regulatory scheme.

The failure of the Commission to require Class A applications to protect all of the pending NTSC applications becomes even more troubling considering the tension that will result between Section 336(f)(7)(A) and Section 307(b) of the Communications Act. By refusing to protect all of the pending NTSC applications, the Commission's interpretation of Section 336(f)(7)(A) of the CBPA has the potential to deprive many communities of their first local television service, and, in many instances, a new network service.[11] Therefore, because the Commission's interpretation of Section 336(f)(7)(A) is inconsistent with the well-established objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of full-service television

[11] Of the 41 WB-related NTSC proposals which have been pending before the Commission since July 1996, 32 of them propose to bring a first local television service to the designated community.

broadcast stations among the various states and communities,[12] the Commission should require Class A applications to protect all pending NTSC applications.

The Commission appears to base its decision to protect only a limited class of NTSC applications on the fact that many of the pending applications for new full-service television stations include a request for a waiver of the DTV freeze, and, thus, have not achieved "cut off" status.[13] However, the fact that many of the pending NTSC proposals have not been processed by the Commission or achieved "cut off" status is due to no fault on the part of the applicants or rulemaking

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[12] 47 U.S.C. §307(b). *See National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing a goal of the Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression").

[13] In July 1987, the Commission initiated the DTV proceeding and ordered a freeze on new analog TV allotments which temporarily fixed the Television Table of Allotments for 30 designated television markets and their surrounding areas. *See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987), 52 Fed.Reg. 28346 (1987) ("*Freeze Order*"). The Commission adopted its *Freeze Order* in order to "preserve sufficient broadcast spectrum to insure reasonable options relating to spectrum issues for . . . new technologies." *Id.* at ¶2. LPTV stations and translators continued to be licensed throughout the DTV "freeze" due to their secondary status. Indeed, the secondary nature of LPTV service is the very basis upon which many "qualified LPTV stations" obtained their existing authorization. LPTV licensees have used the "secondary" nature of their service to commence operation, remain on the air, and enhance their respective facilities throughout the DTV proceeding, while, at the same time, many NTSC proponents (including the WB-related applicants and rulemaking petitioners) have not had their proposals acted upon by the Commission due to the DTV freeze.

As a result of this disparate treatment during the freeze, it is grossly inequitable not to require qualified LPTV stations to protect the pending NTSC proposals of those parties who have been precluded from receiving an NTSC license as well as an initial paired DTV channel assignment during the DTV freeze because they proposed a *primary service*. Requiring pending NTSC applications to protect Class A applications is especially egregious because the NTSC proposals have been pending at the Commission for a minimum of nearly four years, if not substantially longer. *See Order and Notice of Proposed Rule Making, In the Matter of Establishment of a Class A Television Service*, FCC 00-16, ¶28 (released January 13, 2000) ("*NPRM*") (noting that some NTSC proposals have been pending for more than ten years).

petitioners. The FCC established the DTV Table of Allotments in the *Sixth Report and Order*,[14] which was released on April 21, 1997. In its reconsideration order in that proceeding, which was released on February 23, 1998,[15] the Commission stated that its DTV implementation plan was "finalized" through that reconsideration order and its related *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860 (1998). The reconsideration order became effective on April 20, 1998,[16] which was more than 19 months prior to the enactment of the CBPA. Therefore, even assuming, *arguendo*, that the Commission were to take the position that the DTV Table of Allotments was not finalized until the effective date of its reconsideration order in April 1998, the Commission had over 19 months in which to lift the DTV "freeze," which was effectively mooted by the establishment of the DTV Table, and process the pending NTSC applications and allotment rulemaking petitions.[17] Indeed, the Commission repeatedly has stated that it would seek to accommodate these pending applications and allotment rulemaking petitions for new NTSC stations by giving the applicants and petitioners an opportunity to amend their respective proposals (to the extent necessary) after the DTV Table of Allotments was adopted.[18] It is arbitrary

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[14] *Sixth Report and Order, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, 12 FCC Rcd 14588 (1997).

[15] *See Memorandum Opinion and Order*, 13 FCC Rcd 7418 (1998).

[16] *See* 63 Fed.Reg. 13546 (March 20, 1998).

[17] This analysis ignores the fact that the Commission, if it had elected to do so, could have processed all of the pending NTSC applications, accepted them for filing, and then held the applications in abeyance pending the final resolution of the DTV proceeding. The Commission chose, instead, not to process any of these pending NTSC proposals, even though some of them have been pending for more than ten years. *See NPRM*, ¶28.

[18] *See, e.g., Advanced Television Systems and Their Impact Upon the Existing Television*
(continued...)

and capricious, and constitutes an abuse of discretion, for the Commission now to take the position that these pending applications and allotment rulemaking petitions for new full-service television stations -- which it chose not to process during the pendency of the DTV freeze -- are not entitled to protection from subsequently-filed Class A LPTV applications because they have not been processed and achieved "cut off" status.

It also is arbitrary and capricious for the Commission not to protect all of the pending applications for new full-power television stations without making any effort to determine the effect that the pending NTSC applications would have on potential Class A stations. It may well be that there is sufficient spectrum available to incorporate Class A stations into the Commission's existing regulatory framework without turning the Commission's longstanding regulatory scheme on its head by effectively depriving pending NTSC proposals of their primary service status. Indeed, due to the substantially smaller service contours of LPTV stations and the fact they are licensed on the basis of interfering contours, rather than minimum distance separations, LPTV stations have substantially greater flexibility in attempting to find a replacement channel than full-power stations. It would be much easier for an LPTV station to find a suitable replacement channel and make minor adjustments in its technical operation than it would be for a full-power station, whose options are extremely limited due to its significantly greater coverage area.

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[18](...continued)
Broadcast Service, Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders, 14 FCC Rcd 1348, ¶41 (1998). *See also Reallocation of Television Channels 60-69, the 746-806 MHZ Band, Report and Order*, 12 FCC Rcd 22953 (1998); *Public Notice*, DA 99-2605 (released November 22, 1999) ("Mass Media Bureau Announces Window Filing Opportunity For Certain Pending Applications and Allotment Petitions for New Analog TV Stations") ("*Window Filing Notice*"); *Window Filing Opportunity For Certain Pending Applications and Allotment Petitions For New Analog TV Stations Extended to July 15, 2000*, 15 FCC Rcd 4974 (2000).

Furthermore, despite the Commission's determination to protect only those pending NTSC applications which have been processed and are awaiting a grant, many of the pending NTSC applications were filed long before those of the winning auction bidders and those which are proposed for grant in pending settlements. Moreover, a substantial number of the pending freeze-waiver applications were filed before many of the potential Class A LPTV stations obtained their existing authorization. Thus, there is no basis in either fact or law for requiring Class A applications to protect certain pending NTSC applications, but not others. For all of these reasons, the Commission's decision not to require Class A applications to protect all pending NTSC applications is arbitrary and capricious, and constitutes an abuse of the Commission's discretion.

III. The FCC Erred By Extending the Statutory Period in Which to File Class A Applications.

Section 336(f)(1)(C) expressly states that LPTV licensees "may submit an application for a class A designation . . . *within 30 days after final regulations are adopted* . . . ." 47 U.S.C. §336(f)(1)(C) (emphasis added). Nevertheless, the Commission concluded that LPTV licensees may file applications for Class A licenses for a period of up to six months after the effective date of the new rules. *R&O* at ¶13.

The Commission's interpretation of Section 336(f)(1)(C) of the CBPA violates the principles of statutory construction. It is well established that where the intent of Congress is clear, an agency must give effect to that unambiguously expressed congressional intent.[19] Indeed, as the Supreme Court has stated:

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[19] *See Engine Manufacturers Association v. U.S. E.P.A.*, 88 F.3d 1075, 1084 (D.C. Cir. 1996), citing *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). In this case, the FCC did not attempt to show that the 30-day filing period expressly set forth in the CBPA is somehow inconsistent with Congress' intent. Indeed, as demonstrated below, the 30-day filing period for Class A applications is entirely consistent with the legislative intent that there be a limited, one-time opportunity to seek a Class A license.

The CBPA clearly reflects that it is intended to apply to only a very limited group of LPTV stations:

> (1) Since the creation of low-power television licenses by the [FCC], *a small number of license holders* have operated their stations in a manner beneficial to the public good providing broadcasting to their communities that would not otherwise be available.
>
> (2) *These* low-power broadcasters have operated their stations in a manner consistent with the programming objectives and hours of operation of full-power broadcasters providing worthwhile services to their respective communities . . . .

CBPA, §§(b)(1) and (b)(2) (emphasis added). Moreover, in enacting the CBPA, Congress stated that "it is *not clear that all LPTV stations* should be [guaranteed a future] in light of the fact that many existing LPTV stations provide little or no original programming service."[20] The express language of the CBPA and the Congressional Record make abundantly clear that Congress intended that only a small number of LPTV stations would be entitled to Class A status, and that the 30-day filing

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[20] 145 Cong. Rec. S14725 (November 17, 1999) (emphasis added).

period expressly set forth in Section 336(f)(1)(C) of the CBPA is entirely consistent with Congress' intent.

In concluding that the CBPA permits Class A applications to be filed more than 30 days after final regulations are adopted, the Commission based its determination on Congress' use of the word "may" in Section 336(f)(1)(C), and contrasted it with the word "shall" in Section 336(f)(1)(B). The Commission found that Congress' use of the word "may" was permissive, and, therefore, that Class A applicants are not required to file their applications within 30 days after final rules are adopted. *R&O* at ¶13. The Commission also stated, without offering any support whatsoever, that "we have the authority to provide for a longer filing period." *Id.*

The Commission's interpretation of Section 336(f)(1)(C) of the CBPA is fundamentally flawed. In Section 336(f)(1)(B), Congress directed that the Commission "shall" send a notice to *all LPTV licensees* that described the requirements for a Class A license. 47 U.S.C. §336(f)(1)(B). Congress also required that, "[w]ithin 60 days after such date of enactment, *licensees intending to seek class A designation shall* submit a certification of eligibility . . . ." *Id.* (emphasis added). Thus, in using the word "shall", Congress issued an inclusive directive to both the Commission and a specifically-identified applicant group, in which all parties who were subject to the directive were required to take a specific action (*i.e.*, either send a notice or submit a certificate of eligibility).

In Section 336(f)(1)(C), however, Congress did not issue an inclusive directive because it did not specifically identify any licensees as being required to file a Class A application. Instead, Congress stated that "*a licensee may submit* an application for class A designation under this paragraph within 30 days after final regulations are adopted . . . ." 47 U.S.C. §336(f)(1)(C) (emphasis added). In contrast to its all-inclusive and specific directive in the immediately preceding

provision, in subsection (C), Congress made the general statement to *all* qualified LPTV stations that they *may* file an application for a Class A license. The statutory language makes clear, however, that if they choose to do so, they must file their application within 30 days after final rules are adopted. The Commission's analysis of Section 336(f)(1)(C) completely ignores the fact that Congress never intended to require all qualified LPTV stations to apply for a Class A license, but merely provided an opportunity for these licensees to seek Class A status. Indeed, in Section 336(f)(1)(A), Congress stated that "the Commission shall prescribe regulations to establish a class A television license *to be available to* licensees of qualifying low-power televison stations." 47 U.S.C. §336(f)(1)(A) (emphasis added).

Furthermore, the FCC's interpretation of Section 336(f)(1)(C) renders the phrase "within 30 days after final regulations are adopted" superfluous, which again violates the rules of statutory construction. *See, e.g., Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) (statutory interpretations that "render superfluous other provisions in the same enactment" are strongly disfavored); *Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986) (canons of statutory construction require courts to avoid interpreting a statute in such a manner as to render part of it meaningless); *National Association of Recycling Industry v. ICC*, 660 F.2d 795, 799 (D.C. Cir. 1981) (statutory interpretations which render portions of statutory provision meaningless are disfavored); *U.S. v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.").

It is well established that it is the function of the legislative branch to not only define the goals of its legislation, but also to choose the means by which those goals are to be achieved. *See*

Consolidated Rail Corp. v. United States, 896 F.2d 574, 579 (D.C. Cir. 1990). Allowing LPTV stations to submit Class A applications outside the statutory time period would violate the express statutory mandate and "eviscerate Congress' carefully scripted timetable."[21] The Commission may not avoid clearly expressed congressional intent in the CBPA simply by adopting an interpretation that, in its view, might better serve the public interest. *See Engine Manufacturers Association v. EPA*, 88 F.3d at 1089. In order for the FCC to avoid a literal interpretation of Section 336(f)(1)(C) of the CBPA, the Commission was required to show that, in light of the overall structure of the statute, Congress could not have meant what it said. *Id.* (footnote omitted). As demonstrated above, the Commission could not have succeeded in this regard because the limited filing opportunity established by Section 336(f)(1)(C) is entirely consistent with Congress' intent that Class A licenses be made available to only "a small number" of qualified LPTV licensees.[22] Therefore, because the CBPA does not contain any language even suggesting that those "licensees intending to seek Class A designation" are entitled to submit their applications more than 30 days after final regulations are adopted, the FCC impermissibly substituted its judgment for that of Congress by extending the 30-day statutory filing period.

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[21] *See* Comments of Davis Television Clarksburg, L.L.C., *et al.*, p. 10, filed February 10, 2000.

[22] CBPA, §(b)(1). In the initial *Notice of Proposed Rule Making,* the Commission itself recognized that there are practical limits on the number of LPTV stations that may become Class A licensees, and that there simply is not enough spectrum available to grant primary status to all of the operating LPTV stations. *See Notice of Proposed Rule Making, In the Matter of Establishment of a Class A Television Service*, Docket No. 99-292, RM-9260, FCC 99-257, ¶46 (released September 29, 1999).

The Commission's error in interpreting Section 336(f)(1)(C) becomes even more clear in considering the nature of the overall statute. The CBPA contains a carefully-designed timetable, which includes a series of statutory deadlines:

(i) The FCC was required to adopt final regulations establishing a Class A license within 120 days of the enactment of the CBPA (47 U.S.C. §336(f)(1)(A));

(ii) The FCC was required to send a notice to all LPTV licensees describing the requirements for a Class A license within 30 days after the date of enactment (47 U.S.C. §336(f)(1)(B));

(iii) Licensees intending to seek a Class A license were required to submit a certification of eligibility within 60 days of enactment (*Id.*);

(iv) The FCC is required to grant Class A applications within 30 days after receipt of an application that is "acceptable for filing" (47 U.S.C. §336(f)(1)(C)); and

(v) Those DTV stations seeking to maximize their facilities and be protected from Class A applications were required to file an intent to maximize on or before December 31, 1999, and a maximization application by May 1, 2000 (47 U.S.C. §336(f)(1)(D)).

As reflected above, Congress' requirement that Class A applications be filed within 30 days after final regulations are adopted is merely one element in the CBPA's carefully-scripted timetable. Indeed, the 30-day period for filing Class A applications is tied directly to the deadline that Congress established for the Commission to adopt final regulations establishing a Class A license.[23] In light of all of the other specific statutory deadlines set forth in the CBPA, it is clear that if Congress had intended to permit qualified LPTV stations to have up to six months to file Class A applications, it would have said so in express language.

Furthermore, if Congress' statement that all qualified LPTV stations "may submit an application for a class A designation . . . *within 30 days after final regulations are adopted*" was

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[23] *See* 47 U.S.C. §§336(f)(1)(C), 336(f)(1)(A).

merely intended to suggest that Class A applications could be filed immediately upon the effective date of the final rules, Congress would have made this abundantly clear. As demonstrated above, by establishing a 30-day statutory filing period, the FCC has impermissibly substituted its judgment for that of Congress and effective written the 30-day filing period right out of the statute.

In a related manner, the Commission also erred in providing LPTV stations operating on channels 52-59 with an extended period in which to file Class A applications. The Commission required stations operating on these channels to have filed a timely certification of eligibility, and granted these stations an immediate presumption of displacement.[24] Therefore, they too should be required to file their Class A applications within the statutory time period. Although LPTV stations operating on channels 52-59 are not entitled to primary status until they are assigned an in-core channel and have been granted a construction permit for that channel, there is no statutory basis upon which to permit them to file a Class A application beyond the 30-day statutory period.

IV. The FCC Should Adopt a Procedure to Resolve Conflicts Between Pending NTSC Proposals and Class A Applications Similar to that Used in FM Allotment Cases.

The Commission stated that it would permit Class A applicants to enter into interference or relocation agreements with applicants for full-service television stations, so long as the agreements are consistent with the public interest. *R&O* at ¶75. In the event the FCC does not reconsider its decision and require Class A applications to protect all pending NTSC applications, the Commission should adopt a channel relocation scheme for Class A stations that is similar to the procedure used in FM allotment cases. In those instances where there is a conflict between a Class A application or station and a pending NTSC proposal, and the parties are unable to enter into an interference or

[24] *R&O* at ¶¶103, 100.

relocation agreement, the Commission should permit the NTSC proponent (*i.e.*, applicant or allotment rulemaking petitioner) to force the Class A applicant/station to move to a suitable alternative channel (including a frequency offset) under certain conditions.

This procedure should apply only where (i) the full-power station has presented a satisfactory engineering showing demonstrating that it cannot operate on any channel other than the one upon which it seeks to operate; (ii) the Class A station can operate on the proposed channel from its existing transmitter site; (iii) the Class A station would continue to cover at least 90% of its existing service area on the new channel; and (iv) the full-power applicant agrees to reimburse the Class A station for the reasonable expenses incurred in relocating to its new channel. Upon the filing of a proposal by an NTSC proponent that meets these conditions, the Commission should issue an order to show cause to the Class A applicant/station requiring it to demonstrate why its authorization should not be modified to specify operation on the new channel.

As described above, this procedure would be entirely consistent with the FCC's reallotment scheme in FM allotment cases, and has the potential to provide even greater public interest benefits because of the inherent differences between the radio and television broadcast services. Indeed, full-power television stations, *inter alia*, have substantially wider coverage areas than radio stations, have larger audiences, are required to provide a minimum amount of programming tailored specifically for children, and potentially may provide the specified community and its surrounding area with a new network service. In those instances where a Class A station and an NTSC proponent cannot reach an agreement concerning a channel relocation or interference arrangement, adoption of this proposal would enable a new full-power television station to go on the air, which otherwise would be precluded by the Class A station.

As stated above, the Commission has failed to conduct any analysis to determine the impact that the pending NTSC proposals may have on potential Class A stations. The WB believes, however, that there is sufficient spectrum available to incorporate Class A stations into the Commission's existing regulatory framework without precluding new full-power television stations. Due to the substantially smaller service contours of LPTV stations and the fact they are licensed on the basis of interfering contours, rather than minimum distance separation requirements, LPTV stations have substantially greater flexibility in attempting to find a replacement channel than full-power stations. Indeed, it is much easier for an LPTV station to find a suitable replacement channel and make minor adjustments in its technical operation than it is for a full-power station, whose options are extremely limited due to the minimum distance separation requirements and its significantly greater coverage area. Furthermore, the Commission has proposed to re-define what constitutes a "major change" for LPTV stations, which should make it easier for LPTV stations to make minor changes in their technical facilities without having to wait for a major change filing window.

Permitting applicants for new full-power television stations and allotment rulemaking petitioners to force Class A stations to move to a new channel, and thereby permit the establishment of a new full-service television station, would promote the purposes of Section 307(b) of the Act because many of the pending NTSC applications and allotment rulemaking petitions would bring the designated community its first local television service. The adoption of this channel relocation procedure also would promote the emergence of new networks by providing them with an opportunity to gain a new affiliate and thereby enhance their distribution. Moreover, there is no public interest benefit to be gained by permitting Class A stations to remain on their existing channel

at the expense of precluding a new full-power television service. Therefore, if a Class A application or station is found to be in conflict with a pending NTSC proposal, including an amendment to a pending application or allotment rulemaking petition filed pursuant to the Commission's *Window Filing Notice*,[25] the Commission should grant the amended NTSC proposal so long as it meets the conditions outlined above and otherwise complies with the Commission's rules.

V. The Grant of Any Class A Application Should Be Conditioned Upon the Commission's Reconsideration Order in This Proceeding and a Pending Court Appeal in the FCC's Auction Rulemaking Proceeding.

Assuming, *arguendo*, that the Commission does not reconsider its decision requiring Class A applications to protect only a limited class of pending NTSC applications, due to the 30-day statutory period for filing Class A applications and the expedited time frame established by the CBPA for granting acceptable Class A applications,[26] the Commission should make the grant of any Class A application conditioned upon its reconsideration order in this proceeding as well as the D.C. Circuit's decision in *Orion Communications Limited v. FCC*, Case Nos. 98-1434, *et al.* ("*Orion*"), which currently is pending before the court.

Due to the brief statutory filing period and expedited time frame in which the FCC must grant acceptable Class A applications, the Commission will not have an opportunity to address the issues raised on reconsideration in this proceeding prior to the time that it is required to grant many of the Class A applications that are filed soon after the effective date of the new rules. Thus, in the

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[25] *Public Notice*, DA 99-2605 (released November 22, 1999) ("Mass Media Bureau Announces Window Filing Opportunity For Certain Pending Applications and Allotment Petitions for New Analog TV Stations").

[26] Section 336(f)(1)(C) requires the Commission to award a Class A license to any qualified LPTV station within 30 days after receipt of a Class A license application that is "acceptable for filing." 47 U.S.C. §336(f)(1)(C).

event the FCC grants reconsideration with respect to certain matters contained in the *R&O*, including the matters raised in this petition, it may be necessary for the Commission to rescind the grant of certain Class A applications.

In addition, *Orion* involves an appeal from the Commission's decisions in its auction rulemaking proceeding,[27] in which the D.C. Circuit is addressing the issue of whether the FCC is required to open a filing window and accept competing applications for new full-power television stations where one application (a "singleton") was filed on or before September 20, 1996. In the event the court determines that the Commission is not required to accept competing applications under these circumstances, any singleton application filed by September 20, 1996, will thereby be cut off from further filings, and, thus, be entitled to protection from Class A applications in accordance with the *R&O*.[28] As a result, the D.C. Circuit's decision in *Orion* may well preclude certain LPTV stations from obtaining Class A status (at least on their existing channel), and may require the Commission to rescind the grant of certain Class A applications which are subsequently found to conflict with a pending singleton application. Therefore, rather than having to rescind the grant of certain Class A applications either because of the FCC's decision on reconsideration in this

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[27] *See First Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97234, *et al.*, 13 FCC Rcd 15920 (1998); *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999).

[28] *R&O* at ¶46. Although some of these singleton applications may involve a freeze waiver, and, thus, may not have been accepted for filing, the Commission's decision not to process these applications cannot negate a finding by the court in *Orion* that the Commission is not required to accept competing applications and that such singleton applications are cut off from further filings. Indeed, each of these singleton applications had a "reasonably ascertainable predicted Grade B contour" as of November 29, 1999, and the identity of the successful applicant is known in each case. *See Id.*

proceeding or the court's decision in *Orion*, the Commission should condition the grant of any Class A application upon its reconsideration order in this proceeding and the D.C. Circuit's decision in *Orion*.

VI. The FCC's "Local Programming" Requirement Should Be Clarified.

The Commission should clarify its "local programming" requirement to make clear that a licensee of commonly-owned Class A stations cannot import its "local programming" from one "market area" to another. In order for an LPTV station's programming to qualify as "local programming" under the CBPA, the programming must be produced within the same "market area" in which it is aired, and may not be produced in a distant market.

VII. Conclusion.

As demonstrated herein, the FCC's interpretation of Section 336(f)(7)(A) of the CBPA is inconsistent with the principles of statutory construction, is arbitrary and capricious, and constitutes an abuse of the Commission's discretion. Because Congress did not express a clear legislative intent to overturn the Commission's longstanding regulatory policy of protecting primary service applications from subsequent filings, the Commission should require Class A applications to protect all pending NTSC applications regardless of whether they have been accepted for filing or have been cut off from competing applications. The Commission also erred by extending the statutory filing period and permitting Class A applications to be filed more than 30 days after final regulations have been adopted.

Assuming, *arguendo*, that the FCC does not reconsider its decision and require Class A applications to protect all pending NTSC applications, the Commission should adopt a procedure for resolving conflicts between pending NTSC proposals and conflicting Class A stations that is

similar to the procedure used in FM allotment cases. Furthermore, due to the short statutory period in which Class A applications may be filed and the expedited time frame in which the Commission must grant acceptable Class A applications, the Commission should make the grant of any Class A application conditioned upon its reconsideration order in this proceeding and the D.C. Circuit's decision in *Orion*.

WHEREFORE, in light of the foregoing, The WB Television Network respectfully requests that this Petition for Reconsideration be GRANTED.

Respectfully submitted,

THE WB TELEVISION NETWORK

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CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 9th day of June, 2000, copies of the foregoing "Petition for Reconsideration" were hand delivered to the following:

The Honorable William Kennard
Chairman
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The Honorable Harold Furchtgott-Roth
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